proceeding within 180 days of enactment (47 U.S.C. § 325(b)(3)(A)). The Commission must "issue regulations implementing the requirements" of Section 614 within 180 days of enactment (Section 614(f)). We interpret our Congressional instructions to require putting the signal carriage rules into effect promptly, and so we do not anticipate delaying the effective date of the must-carry rules until the retransmission consent provisions become operational (i.e., October 6, 1993). However, some cable systems may not be in immediate compliance with the new signal carriage requirements and their decisions on how to comply may depend in part on the rules adopted, particularly with regard to market definition and low power television carriage. Therefore, we believe that it would be appropriate to allow a limited amount of time for cable systems to come into compliance with the new must-carry rules. We seek comment on this matter.

49. Section 614(b)(9) requires, inter alia, that cable operators provide at least 30 days' advanced written notice before deleting a local commercial television station from carriage. In the initial period after the must-carry rules become effective and before the retransmission consent provisions become effective, we believe that this provision applies to all local commercial television stations. We seek comment on this tentative interpretation.

50. We also seek to define the election process in a manner that will allow broadcasters and cable operators to make a relatively smooth transition from the current regulatory regime to that of the 1992 Act. Broadcast stations, pursuant to regulations to be adopted by the Commission, must make their election between must-carry and retransmission consent "within one year after the date of enactment" of the 1992 Act. We seek comment on an appropriate date by which this selection must be made and on the degree of flexibility we have under the 1992 Act to require stations to make their initial election earlier than the stated one year final deadline. An earlier deadline might facilitate a smooth transition to retransmission consent and would accommodate the need to provide subscribers with some advance warning of carriage or rate changes. In this connection, we ask commenters to address the interplay between retransmission consent and the cable compulsory license royalty regulations, which, we understand, treat a signal as carried for a full six-month reporting period if it is carried for any part of the period. The Copyright Office reporting periods run from January 1 to June 30 and from July 1 to December 31. We also seek comment on whether broadcasters' subsequent triennial elections should be subject to a deadline earlier than the final October 6 date specified in the statute. Pursuant to those elections, regardless of the deadline for making them, changes in broadcasters' status would become effective on October 6, 1996, 1999, 2002, etc.

51. We propose to require each station to place a notarized copy of its election statement in its public file and to send a copy to every cable system within the station's market. We seek comment on this proposal. Because television stations must make their elections on a system-by-system basis (with limited exceptions), it is possible that a station might fail to notify one or more cable systems in its local market of its election. What should the consequences of such a failure be? Should we prescribe a default election procedure? What rules, if any, should we adopt to address this situation?

52. We recognize that there will be new commercial television stations going on the air in the years ahead. We propose that new stations be required to make their initial retransmission consent/signal carriage election within 30 days of the time that they commence regular broadcasts. They will make subsequent elections according to the schedule described in the previous paragraph. If a new station elects must-carry status, some cable operators may be required by Section 614 to carry it. In order to do so, these operators may need to drop or move another service. To allow time for such adjustments, we propose that a new station's election take effect 60 days after it is made. We seek comment on these proposals and on how we should determine when a new station commences regular broadcasts.

D. Retransmission Consent and Section 614

53. Section 325(b)(4) provides that if a station elects to exercise retransmission consent rights with respect to a cable system, "the provisions of section 614 shall not apply to the carriage of the signal of such station by such cable system." In this subsection of the Notice, we seek comment on the relationship between retransmission consent and Section 614.

54. Retransmission Consent and the Must-Carry Signal Complement. The 1992 Act requires that "[A] cable operator shall identify, upon request by any person, the signals carried on its system in fulfillment of the requirements of this section."[63] However, neither the 1992 Act nor the Conference Report address whether cable operators may use local signals carried pursuant to retransmission consent agreements to meet the signal carriage requirements of Section 614. However, the Senate Report does address this issue. Because there was not a retransmission consent provision in the House cable bill, and because the conference agreement simply adopts the Senate provision, we are inclined to rely on the Senate Report. It states that "the FCC's rules should provide that carriage of a station exercising its right of retransmission consent will count towards the number of local broadcast signals that a cable system is required to carry under sections 614 and 615."[64] We therefore tentatively conclude that cable operators may use local retransmission consent channels to meet the Section 614 signal carriage requirements and we seek comment on this tentative interpretation.

55. Non-Applicability of Provisions of Section 614 to Retransmission Consent Signals. Section 614 includes several provisions governing the manner in which cable operators shall carry local television stations. For example, cable operators must carry the primary video, accompanying audio, closed caption transmissions, and, to the extent possible, other program-related material in the vertical blanking interval or on subcarriers (Section 614(b)(3)(A)). In addition, cable operators must carry the stations' complete program schedules (Section 614(b)(3)(B)). The must-carry provisions of the 1992 Act also govern channel positioning (Section 614(b)(6)), provision of signals to all subscribers of a cable system (Section 614(b)(7)), and

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63 Section 614(b)(9).

64 Senate Report at 37-38. See also id. at 84.

notification by cable operators of stations prior to deleting or repositioning them (Section 614(b)(9)). Moreover, cable operators are prohibited from accepting or requesting compensation from stations electing must-carry privileges (Section 614(b)(10)).

56. A reading of Section 325(b)(4) and Section 614 in their entirety suggests that the provisions enumerated in the previous paragraph apply only to local stations carried pursuant to an election of must-carry status. This is our tentative interpretation. Section 614 is captioned "Carriage of Local Commercial Television Signals" and, by itself, suggests that the provisions appearing thereunder are waived if retransmission consent is elected. However, we note that the wording of these provisions is not uniform. For example, the channel positioning provision refers to "[E]ach signal carried in fulfillment of the carriage obligations of a cable operator under this section," while the signal quality provision refers to "signals of local commercial television stations that a cable operator carries." The signal availability provision speaks of "[s]ignals carried in fulfillment of the requirements of this section," while the content to be carried provision refers to "the entirety of the program schedule of any television station carried on the cable system" (subject to the Commission's sports broadcasting, network nonduplication, and syndicated exclusivity rules). In order to resolve this possible ambiguity, we seek comment on our tentative interpretation that these provisions, in fact, apply only to must-carry stations.

E. Retransmission Consent Contracts

57. When a cable system must have "the express authority of the originating station" to retransmit its television signal, we propose to require that such authority be conveyed in writing. It is not our intention, nor do we have the resources, to regulate every detail of the terms and conditions of the authority granted, but certain specific provisions of the 1992 Act do need to be addressed. As a preliminary matter, we note that Section 614(d) establishes a mechanism for resolving disputes between cable operators and local commercial television stations regarding operators' obligations under Section 614, but there is no procedure specified for resolving disputes between cable operators and television stations over retransmission consent authorization. We tentatively conclude that such disputes should be resolved in a court of competent jurisdiction and we seek comment on this conclusion.

58. Contracts Between Cable Operators and Local Stations. The previous subsection enumerated a number of provisions concerning manner of carriage that appear mandatory only for carriage of must-carry signals. We note that nothing prevents cable operators and television stations from negotiating retransmission consent contracts that contain provisions identical to those in Section 614. Moreover, in contrast to the case of must-carry stations (Section 614(b)(10)), cable operators may accept or request monetary payment or other valuable consideration in exchange for favorable channel positioning (with limited exceptions, noted below), or for signal carriage.

59. We already have regulations that address matters similar to those addressed in Section 614. In particular, Section 76.62 of the Commission's

rules requires that "[w]here a television broadcast signal is carried by a cable system, the signal shall be carried without material degradation and programs broadcast shall be carried in full, without deletion or alteration of any portion thereof." We seek comment on whether this regulation requires any amendment in light of the 1992 Act, particularly with respect to signals carried pursuant to retransmission consent agreements. We tentatively conclude that it would not. We also seek comment on whether our general cable television technical standards rules should apply to cable carriage of retransmission consent signals.[65]

60. Section 325(b) appears to allow cable systems to decline to carry "the complete program schedule" of such stations. Since carriage of "the complete program schedule" is a more stringent requirement than simply carrying in full "programs broadcast", it appears that this part of Section 76.62 (in essence requiring that, if a program is carried, it must be carried in full) can co-exist with Sections 325(b) and 614 of the 1992 Act.[66] We seek comment on whether the new Section 325(b) requires us to revise Section 76.62.

61. We also seek comment on two issues related to the question of carriage of a station's full program schedule. First, although cable operators apparently do not have to carry the full schedule of local stations carried pursuant to retransmission consent, we have tentatively decided that those stations will count against the must-carry signal complement. If a cable system wishes to count such signals for Section 614 purposes, should we require some minimum quantum of carriage and, if so, what should it be? We also invite interested parties to comment on the likelihood that cable operators and local stations would desire or agree to retransmit less than the full program schedule of the stations. Second, how will retransmission consent affect the carriage of signals that are distant with respect to a particular cable system but are not superstations?[67] Such stations can only be carried pursuant to a retransmission consent agreement. What is the likelihood that such stations may find it appropriate or necessary to offer or accept carriage of less than their full program schedule?[68] How might negotiations of this nature be affected by the distant signal royalty calculation regulations of the U.S.

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65 See generally Cable Technical Report and Order and Cable Technical Reconsideration, supra.

66 Cable operators availing themselves of the cable compulsory license are required to retransmit programs without alteration. 17 U.S.C. § 111(c)(3). The cable compulsory license is, of course, applicable to programs carried on retransmission consent signals as well as programs retransmitted on must-carry signals.

67 For the purposes of Section 325(b)(1), "superstation" has the meaning given to it in 17 U.S.C. § 119(d)(9), i.e., "a television broadcast station other than a network station, licensed by the Federal Communications Commission that is secondarily transmitted by a satellite carrier."

68 Commenters should address this question in conjunction with the discussion below of program exhibition rights and retransmission consent.

Copyright Office?[69]

62. Section 325(b)(5) provides that stations exercising retransmission consent rights "shall not interfere with or supersede the rights under Section 614 or 615 of any station electing to assert the right to signal carriage under that section." The Conference Report gives the example that "the FCC should not permit a station negotiating for retransmission rights to contract with a cable system for a channel position to which another station is entitled under sections 614 and 615."[70] We seek comment on how to codify this provision.

63. The Conference Report also addresses the situation in which a television station elects to exercise its signal carriage rights, does not gain carriage pursuant to Section 614, and subsequently is approached by a cable system wanting to carry its signal. The Report declares that "[I]n the event that the cable system elects not to carry such a signal in fulfillment of its obligations under section 614, for example, because it already has carried enough local broadcast stations to fill one-third of its channel capacity, the conferees intend that the broadcaster be permitted to reassert its right to require consent before carriage by the cable system under other conditions." In other words, if the cable system proposes to carry the signal, but not to list it among the channels carried to meet the requirements of Section 614, then the station must have the chance to require its consent for carriage. We propose that stations that do not assert their retransmission consent rights in such circumstances and subsequently receive carriage by a cable system shall be governed by the terms of Section 614. A cable system remains free to change the roster of signals carried to fulfill the requirements of Section 614 by deleting a signal, with 30 days' notice, and replacing it with another. As explained earlier in this paragraph, should the cable system subsequently decide to offer the deleted station carriage not pursuant to Section 614, the station would have the chance to reassert retransmission rights. This suggests that cable operators would be permitted to remove a television signal from its Section 614 list (i.e., stop carrying the signal pursuant to Section 614) without deleting it from carriage, provided that the station has the opportunity to reassert retransmission consent rights. We seek comment on whether there are any other circumstances in which a station is permitted by the statute, in effect, to change its election in the midst of a three-year period. In such circumstances, and in the circumstances specified earlier in this paragraph, how should the change in election be effected?

64. Program Exhibition Rights and Retransmission Consent. Section 325(b)(6) provides that "[N]othing in this section shall be construed as modifying the compulsory copyright license established in section 111 of title 17, United States Code, or as affecting existing or future video programming

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[69] We understand that cable operators must pay for carriage of the full signal even if they do not retransmit the entire program schedule. See 17 C.F.R. § 201.17(f)(3). We invite the U.S. Copyright Office to comment in this proceeding on issues, such as this one, to which its procedures are relevant.

[70] Conference Report at 76.

licensing agreements between broadcast stations and video programmers."[71] The Senate Report thus distinguishes between "the authority granted broadcasters under the new Section 325(b)(1) of the 1934 Act to consent or withhold consent for the retransmission of the broadcast signal, and the interests of the copyright holders in the programming contained in that signal."[72] Accordingly, when a station elects retransmission consent, a cable system (or other multichannel video programming distributor) must obtain the permission of the station to carry its signal -- even if the system has already secured permission to retransmit the individual programs carried on that signal through either the cable compulsory license or the express agreement of the copyright holders.

65. In turn, we must determine whether the broadcast station need obtain any permission from the copyright holders of its programming before granting retransmission consent to a cable system (or other multichannel video programming distributor). We note, first, the above-quoted statutory instruction not to construe this section as affecting existing or future program licensing agreements.[73] This language suggests that any rights created by Section 325(b)(1)(A) can be superseded by the express terms of existing or future agreements between program suppliers and broadcast stations concerning retransmission rights. We seek comment on this interpretation.[74] We also seek comment on whether it would be correct to interpret Section 325(b)(1)(A) as enabling broadcasters, in the absence of any express contractual arrangement, to grant or withhold retransmission consent without authorization from the copyright holders.

F. Reasonableness of Rates

66. Section 325(b)(3)(A) requires the Commission to consider in this proceeding the impact of retransmission consent on rates for the basic service tier and to ensure that our retransmission consent regulations do not conflict with our Section 623(b)(1) obligation "to ensure that the rates for the basic service tier are reasonable." In a separate proceeding, we will be seeking comment on proposed rules for setting basic service rates for cable systems not

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71 The cable compulsory copyright license (17 U.S.C. §111) is also applicable, of course, to programs retransmitted on must-carry signals.

72 Senate Report at 36.

73 More specifically, the Senate Report "emphasizes that nothing in this bill is intended to abrogate or alter existing program licensing agreements between broadcasters and program suppliers, or to limit the terms of existing or future licensing agreements." Id.

74 In this context, commenters should also address the question of whether affiliation contracts between networks and television broadcast stations constitute "existing or future video program licensing agreements between broadcasting stations and video programmers" (Section 325(b)(6))? If so, can networks negotiate affiliation contracts that supersede rights created by Section 325(b)(1)(A)?

subject to effective competition. See Section 623(b)(2).

67. Section 623(b)(2)(C) directs us to take account of seven factors in prescribing our regulations for basic service rates. Among them are "the direct costs (if any) of obtaining, transmitting, and otherwise providing signals carried on the basic service tier . . . and changes in such costs" and "a reasonable profit, as defined by the Commission consistent with the Commission's obligations to subscribers under paragraph (1)" (i.e., our obligations to keep basic rates reasonable).

68. We believe that any fees paid or other valuable consideration granted by cable operators in exchange for retransmission consent clearly qualify as "direct costs . . . of obtaining, transmitting, and otherwise providing signals." However, by directing the Commission to "take into account" this and other factors, the 1992 Act appears to leave us considerable discretion in prescribing rules governing recovery of those costs. The 1992 Act also directs us to take into account a reasonable profit for the cable operator.[75] Hence, it appears that the Commission has the ability, as it adopts rate regulation procedures, to meet its Section 623(b)(1) obligations.

69. The foregoing suggests that there is no specific regulatory action that the Commission need take pursuant to Section 325(b) concerning the impact of retransmission consent compensation on basic rates. However, the Commission does have the authority, pursuant to Section 623(b)(2), to decide on the appropriate treatment of retransmission consent compensation in the determination of basic service rates. We therefore plan to leave this task to our rate regulation proceeding and propose no specific regulatory measures to address this issue herein. We seek comment on this approach. We urge those who advocate that we adopt regulations in this proceeding regarding reasonableness of rates to be specific in their proposals.

V. ADMINISTRATIVE MATTERS

A. Regulatory Flexibility Analysis

70. As required by Section 603 of the Regulatory Flexibility Act, the FCC has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact of these proposed policies and rules on small entities. The IRFA is set forth in Appendix A. Written public comments are requested on the IRFA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the Notice of Proposed Rule Making, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of this

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[75] The Conference Report is more explicit, noting that "[T]he conferees agree that the cable operators are entitled to earn a reasonable profit." Conference Report at 63. The legislative history of this provision appears to suggest that the Commission may interpret the term "reasonable profit" in light of profits earned on the full range of services provided by the cable operator. Id.

Notice of Proposed Rule Making, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration in accordance with Section 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 et seq. (1981).

B. Ex Parte

71. This is a non-restricted notice and comment rule-making proceeding. Ex parte presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in the Commission's rules. See generally 47 C.F.R. Sections 1.1202, 1.203, and 1.206(a).

C. Comment Dates

72. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. Sections 1.415 and 1.419, interested parties may file comments on or before January 4, 1993, and reply comments on or before January 19, 1993. To file formally in this proceeding, you must file an original plus five copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

D. Ordering Clauses

73. Authority for this proposed Rule Making is contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385.

74. For further information on this proceeding, contact Marcia Glauberman, Mass Media Bureau, (202) 632-5414 or Jonathan Levy, Office of Plans and Policy, (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy

Donna R. Searcy
Secretary

APPENDIX A

Initial Regulatory Flexibility Analysis

Pursuant to the Regulatory Flexibility Act of 1980, the Commission finds:

I. Reason for action. This action is taken to implement certain provisions of the Cable Television Consumer Protection and Competition Act of 1992.

II. Objectives. The Cable Act of 1992 and the subsequent Commission actions to implement it are intended to set forth a regulatory scheme for cable systems in the area of broadcast signal carriage and channel usage. Congress adopted the statute to address its concerns regarding the performance of the cable industry in these areas since the 1984 Cable Act was enacted. The must-carry provisions of this act are intended to give local commercial and noncommercial television stations carriage rights on a mandatory basis on cable systems. The retransmission consent provision prohibits cable operators, in certain defined circumstances, from carrying the signals of television stations without first obtaining their consent and permits them to be compensated for such carriage.

III. Legal basis. Action as proposed for this rule making is contained in Sections 4(i) and (j), and 303 of the Communications Act of 1934, as amended, and the Cable Television Consumer Protection and Competition Act of 1992.

IV. Reporting, recordkeeping and other compliance requirements. None.

V. Federal rules which overlap, duplicate or conflict with this rule. None.

VI. Description, potential impact and number of small entities affected. In order to implement the Cable Television Consumer Protection and Competition Act of 1992, the Commission has proposed to add new rules and modify others. Depending on the extent of such actions, different cable systems may be affected in different ways. For example, there are incremental thresholds for signal carriage obligations on cable systems based on channel capacity. With respect to small systems, we note that the statute exempts systems with 300 or fewer subscribers and fewer than 13 channels, although such systems may not delete from carriage any broadcast television station they carry. We observe that there are about 3,200 cable systems with 300 or fewer subscribers, representing 29% of all systems and less than one percent of all cable subscribers. No information is available to indicate what proportion of these systems have 12 or fewer channels. The retransmission consent provision will provide broadcasters, large and small, with the opportunity to be compensated for the carriage of their signals should they choose this option in lieu of must-carry status.

VII. Any significant alternatives minimizing impact on small entities and consistent with stated objective. None.

Statement of Commissioner James H. Quello
Implementation of the Cable Television Consumer Protection and Competition Act of 1992 — Broadcast Signal Carriage Issues

After promoting the cause of must carry for the past seven years, it is nice to finally have someone agree with me. It is especially nice to be joined by the overwhelming majority of Congress.

While I have been most closely associated with the must carry issue, I also have strongly supported the adoption of a retransmission consent requirement. I believe these new requirements represent basic justice for broadcasters, and for the viewers as well. I never felt that the Commission fully defended must carry rules in the past, which led to the predictable result of losing in court twice. Now, with a new law, backed by ample congressional findings, I believe that must carry has the support it deserves, and will need to withstand the court challenge that already has been filed.

Our job at the Commission, in addition to defending the new law, is to fashion clear and workable standards for implementing must carry and retransmission consent. With that in mind, I urge interested parties to file comments in this proceeding to help us with some of the complex issues we will face in fashioning the new rules.